Supreme Court, U.S.
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No. 89-92

In The

Supreme Court of the United States

October Term, 1989

DAVIS IRON WORKS, INC.,
Petitioner,

v

IRVING J. ROSENBAUM,
Respondent.

PETITIONER'S REPLY
TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OBJECTIONS TO RESPONDENT'S COUNTER-STATEMENT OF THE CASE

Contrary to Rosenbaum's assertion in his Brief in Opposition, neither Rosenbaum nor any other participant ever made any contributions to the Plan; all contributions were made by Davis. Rosenbaum has heretofore acknowledged that fact below. (Appellee's Brief, p. 1)

Until the recent filing of Rosenbaum's Brief in Opposition, he has never challenged Davis's assertion of his right to indefinitely defer the distribution of the assets held in his segregated account. In fact, Rosenbaum's Complaint (R. 1: ¶ 12) and his Brief in Support of Motion for Summary Judgment (R. 24: p. 6) expressly acknowledged that fact.

The June, 1984 Plan Amendment (R. 47: Exhibit 6) segregating Rosenbaum's accrued benefit merely provided for segregated accounts. It did not purport to address participants' income tax or ERISA standing issues because that was not its function.

Whether Rosenbaum paid taxes in 1985 or at any other time has never been an issue in this case and is wholly outside the record below.

REASONS FOR ALLOWANCE OF THE WRIT

I

Rosenbaum apparently contends that every duty owed by a fiduciary **to the plan** under 29 U.S.C. §§ 1104(a)(1)(A)(i) and (D) implicitly also involves a duty owed to participants, since presumably any breach of a fiduciary's duty to the plan could ultimately adversely affect benefits owed to its participants. His reasoning is flawed since Congress distinguished between a fiduciary's duties **to a plan** (part 4 of Subtitle B of ERISA) and those **to a participant** (part 5 of Subtitle B of ERISA).

The prohibition against releases is found in 29 U.S.C. § 1110(a) which is contained in part 4, not part 5. See, e.g., *Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988). If Congress had intended to preclude settlements of benefit disputes (such as the one at bar) it would not have limited the prohibition to part 4 duties only.

Rosenbaum acknowledges that 29 U.S.C. § 1110(a) does not bar that portion of the Release relating to his version of the disputed claim resolved by the Agreement. (Brief in Opposition, p. 7) Rosenbaum's remarkable concession is thus fatal to his argument that 29 U.S.C. § 1110(a) bars releases affecting plan benefits since the issue then turns not on the unenforceability

of the Release but rather upon Rosenbaum's subjective interpretation of it. As the Sixth Circuit accurately observed (Petition for Certiorari, Appendix B-9):

> "It would certainly appear, considering the language of the release, that Rosenbaum waived all claims, present and future, as to the trust."

Rosenbaum's citations of *Harlan* v. *Sohio Petroleum Co.*, 677 F.Supp. 1021 (N.D. Cal. 1988) and *Kann* v. *Keystone Resources, Inc.*, 575 F.Supp. 1084 (W.D. Pa. 1983) are inapposite: the plaintiff in *Harlan* never signed a release and *Kann* did not even involve a release.

Rosenbaum's assertion that the Agreement was drafted by Davis's counsel in this appeal fails to acknowledge that Rosenbaum's own counsel in these proceedings discussed and negotiated that Release. The resulting Agreement was not presented to Rosenbaum on a "take-it-or-leave-it" basis.

II

An issue of contract interpretation, although construed by state law, does involve a federal question when it applies to ERISA pension plans. *Landro* v. *Glendenning Motorways, Inc.*, 625 F.2d 1344, 1351 (8th Cir. 1988) observed:

> "The legislative history of [ERISA] demonstrates that in order to fill the gaps left by ERISA's express provisions, Congress intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans, [citations omitted] in much the same way as the federal courts have long fashioned federal common law under Section 301 of the Labor Management Relations Act of 1974."

Rosenbaum does not argue that Michigan contract law cited by Davis differs from federal common law or is not in accord with general contract principles to which the federal courts would look as a source for federal law on the questions involved in this case. *Landro, supra,* at 1352.

The Agreement containing the Release provides that Michigan law shall apply except to the extent that federal law preempts. (R. 25: Exhibit E ¶ 15) Just as *Hoffa* v. *Fitzsimmons,* 673 F.2d 1345, 1358 (D.C. Cir. 1982) applied Michigan contract law to the ERISA release in that case, the instant Agreement should also be governed by Michigan law, since it does not conflict with federal common law.

The following Michigan cases cited by Rosenbaum wherein courts have inquired into the scope of a release are distinguishable. *Denton* v. *Utley,* 350 Mich 332, 86 N.W.2d 537 (1957) and *Harris* v. *Lapeer Public School System,* 114 Mich App 107, 318 N.W.2d 621 (1982) involved either mutual mistake, misrepresentation, fraud or incompetence; the release in *Auto-Owners Insurance Co.* v. *Higby,* 57 Mich App 604, 226 N.W.2d 580 (1975) was limited to the one insurance policy specifically identified therein.

Rosenbaum has made none of the allegations which even his aforesaid Michigan cases would require to upset a release. To the contrary, all he asserts is his unilateral understanding of the Agreement and Release, contrary to the plain and unambiguous language expressed therein.

III

Rosenbaum's assertion that the Sixth Circuit did not even rely on a failure of consideration as a ground for invalidating the Release ignores that Court's statement that "it should be pointed out that Rosenbaum would have

been very foolish to waive a claim to over $50,000.00 for a settlement that netted him about $2,000.00. We hold that the release does not bar this claim." (Petition for Certiorari, Appendix B-11) It is obvious that the Sixth Circuit considered the adequacy of consideration, contrary to Michigan law and *Hoffa, supra*, 673 F.2d at 1360.

IV

At no time prior to Rosenbaum's recently-filed Brief in Opposition did he ever contend that there was any mandatory distribution date affecting his segregated account. In fact, he pleaded just the opposite. (R. 1: ¶ 12; R.24: p. 6.) His dispute of a previously-admitted fact at this stage of the proceedings is untimely and bars him from now asserting it.

The terms of the Plan required participants, upon retirement, to designate their benefit commencement date. The Plan, consistent with ERISA, required that benefits commence not later than age sixty-five. In legal contemplation, the arrangement Rosenbaum made with the trustee when he retired was that Rosenbaum received an immediate lump-sum distribution. It was agreed that the trustee would hold that distribution in Rosenbaum's segregated account in like manner as an independent trustee would have done had Rosenbaum chosen to place it with a bank or brokerage firm; the Trustee was legally obligated to transfer those assets to Rosenbaum whenever he wished. Such an arrangement thus complied with ERISA's mandatory benefit commencement rule, since the distribution was effected upon segregation before his sixty-fifth birthday.

Rosenbaum asserts that "[w]here a former employee seeks to recover a benefit that is payable by the plan, he is considered to be 'eligible to receive a benefit' under 29 U.S.C. § 1002(7)." (Brief in Opposition, p. 13, citing *Amalgamated Clothing and Textile Workers*

Union AFL-CIO, et al v. *Murdock*, 861 F.2d 1406 (9th Cir. 1988)) *Amalgamated* involved an unusual situation, totally distinguishable from the instant case, in which the plan's trustees fraudulently misused their position to self-deal in trust assets. *Amalgamated* did not change the rule in *Kuntz* v. *Reese*, 785 F.2d 1410 (9th Cir. 1986); it simply held " * * * that, for the limited purpose of granting plan participants and beneficiaries standing to sue in cases such as this one, ill-gotten profits held in a constructive trust for plan participants and beneficiaries may be construed as equitably vested benefits under an ERISA plan."

V

Rosenbaum has always contended in the courts below that the Release was ineffective to the extent that it purported to release a cause of action first created by *Bryant* v. *International Fruit Products Company, Inc.*, 793 F.2d 118 (6th Cir. 1986), cert. denied 479 U.S. 986, 107 S.Ct. 576, after he signed the Release, and that he had relied upon the lawfulness of the reversion to Davis at the time of the Release. (R. 24: Brief in Support of Plaintiff's Motion for Summary Judgment, pp. 19-20; Appellee's Brief, pp. 23-24) He now asserts exactly the opposite. (Brief in Opposition, p. 15)

Davis, on the other hand, has consistently argued that *Bryant* applied pre-existing basic contract law principles to the *Bryant* plan and that the law never changed. Davis further argued that, if Rosenbaum was correct, then Davis's receipt of the reversion before *Bryant* was decided was lawful and should now be respected. Implicit in Davis's argument below was that *Bryant* should not be retroactively applied. (R. 47: Brief in Support of Defendant's Response to Plaintiff's Motion for Summary Judgment, p. 25; Appellant's Brief, pp. 21, 33-34; Appellant's Reply Brief, pp. 13-14) Both of the courts below agreed with Rosenbaum that *Bryant*

created new law. (Petition for Certiorari, Appendix B-11; C-14, 20)

Chevron Oil Company v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) considers three separate factors in determining whether a decision is to be applied non-retroactively: (1) whether it establishes a new principle of law or decides an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retrospective operation will further or retard its operation after weighing the merits and demerits in each case; and (3) whether an inequity will be imposed by retroactive application. 404 U.S. at 106-107. The Sixth Circuit below failed to consider those factors when it held that the 1985 reversion to Davis pursuant to a 1984 plan termination was unlawful notwithstanding the fact that those events preceded its 1986 *Bryant* decision.

It is fundamentally wrong, not merely inequitable, to penalize one for committing a lawful act.

VI

Rosenbaum contends that Davis, as Administrator, lacked discretion to administer the Plan. It is remarkable that he advances that contention in light of the following Plan language (R. 25: Exhibit B):

> "3.5(A) * * * The Administrator * * * shall interpret the plan and determine all questions arising in the administration * * * . Any such determinations * * * shall be conclusive and binding upon all persons. On all matters and questions * * * the decision of the Administrator shall govern and control. * * * The Administrator may * * * reconcile any inconsistency * * * as shall be deemed * * * advisable * * * , consistent with the intent that the Plan shall continue to be * * * qualified * * * and shall comply with ERISA * * * ."

See, also, Plan section 7.4: (" * * * the Administrator shall have the power to construe this Agreement * * * in such manner and to such extent as the Administrator shall deem proper to effectuate this Agreement * * * "); and section 26.4(f): ("The decision of the Administrator on review is final.").

Firestone Tire & Rubber Co. v. *Bruch*, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d. 80 (1989) clearly considers the administrator's authority under the Davis Plan as discretionary. Davis's plan administrator's actions must therefore be reviewed under *Firestone*'s "arbitrary and capricious" standard.

Rosenbaum contends that Davis, as administrator, had a conflict of interest, since Davis stood to gain by receiving the reversion, and that a "de novo" standard of review should be applied. Even assuming, *arguendo*, that is true, the conflict did not extend to the administrator's interpretation that Rosenbaum was not a participant under the Plan's definition thereof at the time of Plan termination and that he had no right to share in the reversion with the other then-participants. The Sixth Circuit should have deferred to the administrator on those issues.

VII

29 C.F.R. § 2618.2(b) provides, in pertinent part:

> "'Pool of eligible participants and beneficiaries' means —
>
> * * *
>
> "(b) For any plan that does not provide for reversion of residual assets to the employer, those individuals entitled to benefits in priority categories 2 through 6, determined as of the date plan assets are to be distributed.
>
> "'Priority categories' or 'priority category' means the categories contained in sections 4044

> (a)(1) through (6) of the Act that establish the order in which plan assets are to be allocated."

ERISA sections 4044(a)(1) through (6) refer to plan benefits. Neither 29 C.F.R. § 2618.2 nor ERISA section 4044(a) defines "benefits under the plan." Plan benefits do not extend to surplus assets upon plan termination after vested benefits are **provided for**. *Chait* v. *Bernstein*, 835 F.2d 1017, 1021, 1022 (3rd Cir. 1988); *Blessitt* v. *Dixie Engine*, 848 F.2d 1164, 1173 (11th Cir. 1988, en banc). Irrespective of whether the segregated account constituted actual payment of Rosenbaum's vested benefit, there is certainly no dispute that it absolutely **provided for** that payment. Rosenbaum is thus not within the "pool of eligible participants."

Furthermore, it is the **Plan** that defines those individuals referred to in the regulations who are entitled to benefits. Original Plan Section 12.4 identified those eligible individuals as the "**then participants.**" (R. 25: Exhibit A) Davis contends that Rosenbaum had retired and had received all of his benefits determined under the Plan's formula before the Plan terminated and was therefore not a "then participant." If there was any doubt, Original Plan Section 1.4 removed it, since it expressly provided that retired employees shall not be considered participants in any event. (R. 25: Exhibit A)

Firestone Tire & Rubber Co., supra, 109 S.Ct. at 957-958, interpreted the term "participant" as found in 29 U.S.C. § 1002(7) as:

> " * * * either 'employees in, or reasonably expected to be in, currently covered employment,' * * * or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to **vested** benefits, *Kuntz* v. *Reese*, 785 F.2d 1410, 1411 (CA9) (per curiam), cert. denied, 479 U.S. 916 (1986). In order to establish that he 'may

> become eligible for benefits,' a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. * * * A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to **vested** benefits, however, simply does not fit within the [phrase] 'may become eligible.'" (emphasis added)

It is undisputed that Rosenbaum was a former employee who had retired with no expectation of returning to Davis's employ. His alleged claim is to a portion of the reversion, which, even if considered a benefit, is not a **vested** benefit.

The Sixth Circuit apparently ignored *Firestone Tire & Rubber Co.*'s definition of "participant" and refused to reinstate the Original Plan's definition. By adopting the Amended Plan's definition of "participant" for reversion purposes, under circumstances where the Amended Plan provided for a reversion to the employer, it perverted the clearly-expressed intent of both Plans.

CONCLUSION

Petitioner submits that the courts below improperly decided each issue raised in its Petition for a Writ of Certiorari. Petitioner respectfully requests that this Honorable Court now review the decision of the United States Court of Appeals for the Sixth Circuit affecting the issues presented in its Petition for a Writ of Certiorari.

Respectfully submitted,

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